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4   UNITED STATES DISTRICT COURT

5   NORTHERN DISTRICT OF CALIFORNIA

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7   ANDREW TAN, et al.,   Case No. 15-cv-05128-JSC

            Plaintiffs,
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                                               **ORDER RE: DEFENDANTS' MOTION
9   v.   TO DISMISS SECOND AMENDED
                                               COMPLAINT**
10 GRUBHUB, INC., et al.,
                                               Re: Dkt. No. 50
            Defendants.
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13   In this putative class action, Plaintiffs Andrew Tan ("Tan") and Raef Lawson ("Lawson,"

14 and together, "Plaintiffs") sue Grub Hub Holdings Inc. and GrubHub Inc. ("GrubHub" or

15 "Defendants"), a service that provides food delivery to customers via an on demand dispatch

16 system. The gravamen of Plaintiffs' Second Amended Complaint ("SAC") is that the delivery

17 driver plaintiffs were misclassified as independent contractors and denied the benefits of

18 California wage-and-hour laws. (Dkt. No. 41.[1]) Now pending before the Court is Defendants'

19 motion to dismiss Counts II to V of the SAC for failure to state a claim. (Dkt. No. 50.) Having

20 considered the parties' submissions, and having had the benefit of oral argument on July 31, 2016,

21 the Court DENIES the motion to dismiss. Plaintiffs have pleaded sufficient facts to plausibly

22 support their claims.

23   **BACKGROUND**

24   The Court previously discussed the factual background of this case in a previous order and

25 incorporates that discussion here. (*See* Dkt. No. 38 at 1-3.) Following the Court's dismissal of

26 Plaintiffs' First Amended Complaint ("FAC") with leave to amend, Plaintiff filed the SAC, which

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28 [1] Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the
    ECF-generated page numbers at the top of the documents.

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1   provides additional details regarding delivery drivers' obligations during their work shifts.

2   According to the SAC, drivers working for GrubHub are required to sign up for work

3   shifts ahead of time (such as 2.5, 3, or 4 hour blocks). (SAC ¶ 14.) During work shifts, drivers

4   must be within a particular assigned area—in Lawson's case, a 30 square mile area—and be

5   available to accept delivery assignments; drivers are not permitted to leave their zones unless

6   instructed by a GrubHub dispatcher to perform a delivery outside of the assigned area. (*Id.* ¶¶ 14-

7   15.) Drivers are typically assigned between two and four or more delivery jobs per hour during a

8   shift, with each delivery assignment typically taking between 30 minutes and an hour and a half to

9   complete. (*Id.* ¶ 16.) If drivers fail to accept at least 75% of all delivery orders assigned to them,

10   GrubHub will terminate them. (*Id.* ¶ 17.) Further, drivers risk termination if they fail to arrive at

11   restaurants by a certain time designated by GrubHub. (*Id.* ¶ 18.) Given these restrictions, drivers

12   are required to be in or very near to their cars at all times during their shifts and, as a result, are

13   unable to engage in personal non-work activities. (*Id.* ¶¶ 18-19.) Thus, Plaintiffs allege, the

14   entirety of drivers' shift times is compensable working time. (*Id.* ¶ 14.)

15   The SAC sets forth five causes of action: (1) failure to reimburse for business expenses in

16   violation of California Labor Code § 2802; (2) unlawful and/or unfair business practices under

17   California Business and Professions Code §§ 17200-17208; (3) failure to pay minimum wage in

18   violation of California Labor Code §§ 1197 and 1194; (4) failure to pay overtime in violation of

19   California Labor Code §§ 1194, 1198, 510, and 554; and (5) claim for penalties pursuant to the

20   Private Attorney General Act (PAGA), Cal. Lab. Code § 2698, *et seq.* Lawson alone brings the

21   first four causes of action; Plaintiffs together bring the PAGA claims.

DISCUSSION

23   Defendants move to dismiss portions of the SAC on grounds that: (1) Lawson fails to state

24   plausible claims for relief under California's minimum wage and overtime laws (Counts III and

25   IV); (2) Lawson fails to state a claim under the UCL (Count II) to the extent it relies upon his

26   defective wage claims; and (3) Plaintiffs fail to state a plausible claim under PAGA (Count V).

27   **I.   Counts III & IV: California Minimum Wage & Overtime Laws**

28   The Court previously dismissed Plaintiff's minimum wage and overtime claims because

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1   Plaintiffs failed to allege sufficient facts that give rise to a plausible inference that they were not

2   paid minimum wage or overtime during at least one work week. (Dkt. No. 38 at 6-12.)

3   Specifically, the Court noted that "[t]here are no allegations about what period of time or type of

4   conduct Plaintiffs are counting as hours worked. Without these basic factual allegations, the Court

5   cannot conclude that Plaintiffs' minimum wage or overtime claims are plausible." (*Id.* at 9.)

6   Moreover, to the extent Plaintiffs contended that all of their shift hours are compensable (this had

7   not been pled in the FAC), the Court was unable to make that determination "absent allegations

8   about the number and timing of assignments, geographical restrictions, and what happens when a

9   driver does not accept an assignment." (*Id.* at 12.)

10   Plaintiffs now allege that all of their shift hours are compensable work hours (SAC ¶ 14)

11   and, as noted above, they provide additional facts relating to drivers' work shifts: in particular, the

12   number and timing of assignments (between two and four or more delivery jobs per hour during a

13   shift, each job typically taking 30 minutes to an hour and a half to complete (*id.* ¶ 16)),

14   geographical restrictions (drivers must be within a particular assigned area and in or near their cars

15   at all times during their shifts (*id.* ¶¶ 14-15, 18-19)), and what happens when a driver does not

16   accept an assignment (GrubHub terminates drivers with less than a 75% acceptance rate of orders

17   (*id.* ¶ 17)). Defendants argue that, even with these additional allegations, Plaintiffs wage-and-hour

18   claims remain deficient.

19   First, Defendants insist that Plaintiffs continue to provide insufficient detail regarding a

20   specific work week in which they were not paid overtime or were not paid minimum wages. (Dkt.

21   No. 50 at 5.) According to Defendants, *Landers v. Quality Communications, Inc.*, 771 F.3d 638

22   (9th Cir. 2014), *as amended* (Jan. 26, 2015), requires Plaintiffs to allege facts "establishing the

23   *particular* workweek in which minimum wage and overtime violations purportedly occurred."

24   (Dkt. No. 50 at 5 (emphasis in original)). But, as the Court previously noted, *Landers* does not

25   require Plaintiffs to identify an exact calendar week or particular instance of denied overtime or

26   minimum wage; instead, the allegations need only give rise to a plausible inference that there was

27   such an instance. (Dkt. No. 38 at 8-9; *see also Boon v. Canon Bus. Solutions, Inc.*, 592 F. App'x

28   631, 632 (9th Cir. 2015); *Varsam v. Lab. Corp. of Am.*, 120 F. Supp. 3d 1173, 1178 (S.D. Cal.

1   2015).) Drawing all inferences in Plaintiffs' favor, *Manzarek v. St. Paul Fire & Mar. Ins. Co.*,

2   519 F.3d 1025, 1031 (9th Cir. 2008), Plaintiffs' allegations give rise to the plausible inference that

3   such an instance exists. For example, Plaintiffs allege that "Lawson worked approximately forty-

4   five hours" during the week of November 30, 2015 and "was not paid at time-and-a-half for the

5   hours in excess of forty." (*Id.* ¶ 23.) Taking as true Plaintiffs' allegations that drivers are unable

6   to perform personal non-work activities during a shift (SAC ¶¶ 18-19), one could reasonably infer

7   that Defendants violated the minimum wage and overtime laws where Lawson's entire 45-hour

8   work week in November 2015 was compensable.

9   Second, Defendants contend that Plaintiffs' new factual allegations are implausible and do

10   not establish that all of Plaintiffs' shift hours are compensable. (Dkt. No. 50 at 6-8.) Defendants

11   argue that: (a) the allegations that drivers are "typically assigned . . . between two and four or

12   more delivery jobs per hour" and that each assignment "would typically take between 30 minutes

13   and an hour and a half to complete" are contradictory and thus implausible; (b) the ability of

14   drivers to decline up to 25% of assigned orders means that 25% of shift hours are drivers' personal

15   time; and (c) because Lawson worked a 30 square mile area, he was thus "free to roam" and not

16   geographically restricted. Defendants are essentially asking the Court, on a motion to dismiss, to

17   draw all inferences in their favor. The Court cannot do so. *Manzarek*, 519 F.3d at 1031. Drawing

18   all inferences in *Plaintiffs'* favor as required, each of the above allegations supports the reasonable

19   inference that all shift time was compensable. For example: (a) while Plaintiffs allege the *typical*

20   number of assignments per hour and the *typical* time to complete each assignment, it is plausible

21   that the time to complete assignments may in fact be less for some drivers, such that drivers could

22   complete four or more assignments in an hour; (b) drivers could plausibly decline up to 25% of

23   their assigned orders because they are otherwise already busy with orders (and not simply taking

24   personal time); and (c) although Lawson's working area was a 30 square mile area, he could still

25   have been restricted—and not free to roam, as Defendants suggest—because drivers were required

26   to be in or very near to their vehicles during shifts (SAC ¶¶ 18-19). While Defendants' view of

27   the facts may ultimately prevail, the Court cannot presently conclude that the SAC allegations are

28   facially implausible.

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1   Third, Defendants claim that Plaintiffs have not provided the requisite detail regarding

2 "what hourly and regular rates of pay they used to compute minimum wage and overtime pay,

3 how they calculated those rates, or which records they consulted in doing so." (Dkt. No. 50 at 14.)

4 At the pleading stage, the level of detail Defendants seek is not required. As the Court noted

5 before, the Ninth Circuit in *Boon* rejected the district court's requirement that a complaint "contain

6 an estimate of how much uncompensated time was worked, how often, and at what rate to survive

7 a motion to dismiss." 592 F. App'x at 632 (internal quotation marks and alteration omitted).

8 Again, the complaint allegations need only give rise to a plausible inference that Plaintiffs were

9 not paid minimum wage or overtime during at least one work week. (Dkt. No. 38 at 9.)

10 Defendants' reliance on *Yucesoy v. Uber Technologies, Inc.* does not compel a different result.

11 No. 15-CV-00262-EMC, 2015 WL 6955140 (N.D. Cal. Nov. 10, 2015). There, the court

12 dismissed plaintiffs' minimum wage and overtime claims because they had not pleaded specific

13 facts to support their contention that their waiting time was compensable. *Id.* at *3-4. Thus, it

14 was unclear as to what plaintiffs contended was compensable "work" time and, in turn, the court

15 could not discern the basis for plaintiffs' theories for their wage and overtime claims. *Id.* Here,

16 Plaintiffs' allegations overcome this problem by alleging that all shift time is compensable work

17 time. (SAC ¶¶ 14-19.) As stated above, Plaintiffs' allegations give rise to a plausible inference

18 that they were not paid minimum wage or overtime during at least one work week, and no

19 additional detail is required at this time.

20   Lastly, Defendants argue that Plaintiffs' minimum wage claim fails because Plaintiffs do

21 not allege the costs or types of costs that were deducted when they made their minimum wage

22 calculations or that such costs were the actual cause of Plaintiffs receiving less than the minimum

23 wage in any given week. (Dkt. No. 50 at 9; Dkt. No. 60 at 8-9.) The SAC places Defendants on

24 notice of the types of expenses that are at issue—namely, "expenses for [the drivers'] vehicles,

25 gas, parking, phone data, and other expenses" (SAC ¶ 21)—and have sufficiently alleged that the

26 payment of such expenses caused Plaintiffs to receive less than the minimum wage. (*Id.* ¶ 22

27 ("Because Plaintiffs and other GrubHub drivers are paid by the delivery, and have been required to

28 bear many of the expenses of their employment, their weekly pay rates have fallen below

1   California's minimum wage in many weeks.").) At this stage, the Court need not determine

2   whether the identified expenses *actually* resulted in Plaintiffs receiving less than the minimum

3   wage; rather, the allegations need only show that such causation is plausible. The Court concludes

4   that it is.

5   Accordingly, the Court DENIES Defendants' motion to dismiss Plaintiffs' minimum wage

6   and overtime claims.

II.   Count II: Unlawful and/or Unfair Business Practices

8   The Court dismissed Plaintiffs' UCL claim with leave to amend to the extent it was based

9   on Plaintiffs' claims for failure to pay minimum wage and overtime (Counts III and IV). (Dkt.

10   No. 38 at 12-13.) Plaintiffs have now sufficiently pled their minimum wage and overtime claims.

11   The Court therefore DENIES Defendants' motion to dismiss the UCL claims.

III.   Count V: PAGA Claims

13   The Court previously dismissed Plaintiffs' PAGA claims for failure to plead administrative

14   exhaustion. (Dkt. No. 38 at 13.) In response, Plaintiffs added the following allegations:

> 33.   Plaintiffs Tan and Lawson allege that GrubHub violated
> PAGA in the following ways: (1) failure to reimburse its drivers for
> all necessary expenditures incurred in performing their duties,
> including but not limited to fuel, car maintenance, phones, and data,
> in violation of Labor Code §2802; (2) failing to pay minimum wage
> for each week worked in violation of Ca. Lab. Code §§ 1197 and
> 1194; (3) failing to pay overtime wages for all hours worked in
> excess of forty each week in violation of Cal. Lab. Code §§ 1198,
> 1194, 510, and 554.
>
> 34.   Plaintiff Andrew Tan provided notice of GrubHub's
> violations of various provisions of the California Labor Code as
> alleged in this complaint to the Labor and Workforce Development
> Agency ("LWDA") and GrubHub on November 10, 2015. The
> LWDA has not provided a response to Plaintiff Tan's written notice.
> See Cal. Lab. Code § 2699.3(a)(2)(A).
>
> 35.   Plaintiff Raef Lawson provided notice of GrubHub's
> violations of various provisions of the California Labor Code as
> alleged in this complaint to the Labor and Workforce Development
> Agency ("LWDA") and GrubHub on December 3, 2015. The
> LWDA has not provided a response to Plaintiff Lawson's written
> notice. See Cal. Lab. Code § 2699.3(a)(2)(A).

27   (SAC ¶¶ 33-35.) Defendants complain that the allegations of administrative exhaustion remain

28   deficient because Plaintiffs failed to plead the specific "facts and theories" that were provided in

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1 their written notices to the LWDA. (Dkt. No. 50 at 17.) According to Defendants, "Plaintiffs

2 have not established that they sent the LWDA anything more than a list of purported Labor Code

3 violations by Grubhub." (Dkt. No. 60 at 14.)

4   Drawing all inferences in Plaintiffs' favor, the Court finds that Plaintiffs have sufficiently

5 pled administrative exhaustion. Plaintiffs allege that they provided notice to the LWDA of

6 "GrubHub's violations of various provisions of the California Labor Code *as alleged in this*

7 *complaint*" (SAC ¶¶ 34-35 (emphasis added))—that is, Plaintiffs allege, the notices included the

8 specific Labor Code violations along with the supporting factual allegations set forth in the SAC.

9 This is sufficient to plead notice of the "facts and theories" supporting Plaintiffs' claims. Cal.

10 Lab. Code § 2699.3; *Varsam v. Lab. Corp. of Am.*, 120 F. Supp. 3d 1173, 1182 (S.D. Cal. 2015).

11   The Court had also dismissed with leave to amend Plaintiffs' PAGA claims to the extent

12 those claims were based on Counts III and IV. (Dkt. No. 38 at 13.) Because Plaintiffs have now

13 sufficiently pled Counts III and IV, the PAGA claims can proceed as well.

14   Accordingly, the Court DENIES Defendants' motion to dismiss the PAGA claims.

CONCLUSION

16   For the reasons set forth above, the Court DENIES Defendants' motion to dismiss.

17   Defendants shall file an answer to the SAC within 14 days of this Order. The Court will

18 hold a further case management conference on September 15, 2016 at 1:30 p.m.

19   **IT IS SO ORDERED.**

20 Dated: July 13, 2016

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                     JACQUELINE SCOTT CORLEY
                     United States Magistrate Judge